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Wills -- Illegal Conditions -- Judicial Interpretation

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followed other jurisdictions wherein the remedy is not exclusive, and ruled out such damage under the survival statute. The decision, though consistent with other jurisdictions, results in an anomaly in that it is cheaper to kill than to maim under the Florida statutes. This situation arises in Florida due to the peculiar wording of the Florida Wrongful Death Act which allows an action only to the beneficiary, himself, and limits damages to the amount that the party entitled to sue may have sustained by the death. Here, where the husband has no legal right to his wife's earnings, he cannot claim damages for impairment under the wrongful death act. This situation does not arise in jurisdictions which follow the English act more closely. Under these acts a representative sues for the benefit of all beneficiaries; therefore, the judgment is not limited to the amount recoverable by any one beneficiary.

The anomalous situations presented by this case is, as the court points out, a matter for legislative action rather than for judicial re-interpretation of the survival statute.

CHANDLER F. CULVER

WILLS—ILLEGAL CONDITIONS—JUDICIAL INTERPRETATION

Testator devised a portion of his estate to his wife for life, residue to a trustee to pay the income to the wife for life; both subject to the conditions that the wife not remarry or use the money for the support of their son. Held, in view of a Connecticut statute[1] requiring a parent to support his children if they become poor and unable to support themselves, the condition concerning the son is contrary to public policy, is uncertain, and therefore invalid. *Zdanowich v. Sherwood, 19 Conn. Supp. 89, 110 A.2d 290 (1954).*

It is generally held that a testator may impose any condition in his will so long as it is definite and does not impose an impossibility or involve illegality.[2] The test the courts seem to employ is to determine if the result would induce conduct detrimental to the public interest. For example, restrictions concerning family relationships that would involve a breach of parental duty are held to be void; such as a prohibition of social relations between mother and son,[3] relinquishing control of a child to a stranger,[4] or requiring the separation of father and son.[5] However, a

1. CONN. GEN. STAT. § 2610 (1949), as amended by CONN. GEN. STAT. SUPP. § 1111c (1953).
2. Clemenson v. Resbsamen, 205 Ark. 123, 168 S.W.2d 195 (1943); Thompson v. Thompson, 175 S.W.2d 885 (Mo. 1943); *In re* Houston's Estate, 371 Pa. 396, 89 A.2d 525 (1952).
3. *In re* Ranney's Estate, 161 Misc. 626, 250 N.Y.Supp. 680 (Surr. Ct. 1936).
4. *In re* Carples' Estate, 140 Misc. 459, 250 N.Y.Supp. 603 (Surr. Ct. 1931).
5. *In re* Forte's Will, 149 Misc. 327, 267 N.Y.Supp. 603 (Surr. Ct. 1933).

condition prohibiting the devisee from residing with her relatives in the testator's home has been held valid.[6]

As early as 1711,[7] it was held that a condition in a will contrary to public policy is unenforceable and void.[8] The condition is simply disregarded; that is, the remaining portion is read as if the condition were not there.[9]

At early common law there was no obligation for a parent to support his adult incapacitated children,[10] but American courts realized the moral duty, and either by statute or judicial decision established a legal duty as well. In *Perla v. Perla*[11] the court said,

> . . . Generally the obligation of a parent to support a child ceases when the child reaches majority, but an exception arises when the child is from physical or mental deficiencies unable to support himself . . . .

This view is followed by the majority of jurisdictions,[12] although some courts imply a legal duty only when the child has the impediment at the time of reaching majority.[13] In the present case the father was clearly trying to deprive his son of any of his estate, either directly or indirectly. The son was past the age of majority and was under no handicap. The mother was under no legal obligation to support or aid her son, at that time.

While the primary rule in the construction of a will is to give effect to the testator's intent[14] it is obvious that in the present case the court failed to do so. In the construction of a will, as in any other written instrument, the courts consider such instruments to be drafted in com-

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6. Latorracia v. Latorracia, 132 N.J.Eq. 40, 26 A.2d 522 (1942) *aff'd* Latorracia v. Latorracia, 133 N.J.Eq. 2, 31 A.2d 819 (1943).

7. Mitchel v. Reynolds, 1 P. Wms. 181 (Eng. 1711).

8. Girard Trust Co. v. Schmitz, 129 N.J.Eq. 444, 20 A.2d 21 (Ch. 1941); Parmenter v. Pennsylvania Co., 122 N.J.Eq. 25, 192 Atl. 63 (Ch. 1937); *In re* Dettmer's Will, 262 App. Div. 1032, 30 N.Y.S.2d 333 (1941).

9. Griffin v. Sturges, 131 Conn. 471, 40 A.2d 758 (1944); Hoss v. Hoss, 140 Ind. 551, 39 N.E. 255 (1894); LaMere v. Jackson, 288 Mich. 99, 284 N.W. 659 (1939); Jones v. Jones, 223 Mo. 424, 123 S.W. 29 (1909); Lynch v. Melton, 150 N.C. 595, 64 S.E. 497 (1894). *Contra, In re* Murrow's Will, 41 N.M. 723, 73 P.2d 1360 (1937). *See, In re* Cooper's Will, 75 N.J.Eq. 1177, 71 Atl. 676 (Prerog. Ct. 1909. RESTATEMENT, PROPERTY § 424 comment d, § 425 comment h, § 426 comment c, § 427 comment f, § 428 comment e, § 429 comment J. (1935).

10. *In re* Hoffman's Estate, 261 App. Div. 556, 26 U.Y.S.2d 430 (1941).

11. 58 So.2d 689, 690 (Fla. 1952).

12. Howard v. United States, 2 F.2d 170 (E.D. Ky. 1924); Zakrocki v. Zakrocki, 115 Ind. 556, 60 N.E.2d 745 (1945); Humboldt County v. Bregger, 232 Iowa 494, 4 N.W.2d 422 (1942); Williams v. West, 258 S.W.2d 468 (Ky. 1953); Brochert v. Brochert, 185 Md. 586, 45 A.2d 463 (1946); Schultz v. Western Farm Tractor Co., 111 Wash. 351, 190 Pac. 1007 (1920).

13. Murrah v. Baites, 255 Ala. 178, 50 So.2d 735 (1951); Breuer v. Dowden, 207 Ky. 12, 268 S.W. 541 (1925); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947).

14. Evans v. Ockershansen, 100 F.2d 695 (D.C.Cir. 1938); Wright v. Sallet, 66 So.2d 237 (Fla. 1953); Perkins v. O'Donald, 77 Fla. 710, 82 So. 401 (1919).

pliance with existing laws.[15] When a will or any part thereof is open to two interpretations, one of which is illegal or invalid, the valid interpretation should be adopted as expressive of the true testamentary intent.[16] The court in interpreting a will should indulge every legal presumption in favor of validity of the will.[17]

As the courts, wherever possible, should presume that the testator intended to comply with the law, rather than to break it, it is felt that the will should have been given effect so long as the son was not incapacitated.

PHILIP W. KNIGHT

WITNESSES—EXCLUSION FROM COURTROOM WHILE OTHERS TESTIFY

A trial judge refused to excuse appellant's witness, a psychiatrist, from the rule excluding a witness from the court room while others are testifying. *Held*, the discretion of a trial judge governs those witnesses who are to be excused from this rule, and his decision will not be reversed unless it is prejudicial to the party complaining. *McVeigh v. State*, 73 So.2d 694 (Fla. 1954).

The separation of witnesses, for the purpose of exposing inconsistencies in their testimony, has long been practiced. Like most of our jurisprudence it is said to descend from the common law of England but its inception is indeed much older.[1] Though brought to America by that medium, the first report of separating witnesses in a trial is recorded in the book of

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15. Cleveland Clinic Foundation v. Humphries, 97 F.2d 849, 855 (6th Cir. 1938)(". . . the golden rule of interpretation is the intent of the testator which should be made to conform to the rules of law which it is presumed the testator knew and considered when drafting his will.") *Cf. In re* Nugen's Estate, 223 Iowa 428, 272 N.W. 239 (1937)(A gift to form a charitable library with reference to administration duties which were in conflict with statutory regulations was upheld, the gift being subjected to the statute); *In re* Griffin's Will, 159 Misc. 12, 287 N.Y.Supp. 514 (Surr. Ct. 1936)(Existing laws held incorporated into wills as into every other document).

16. Fussey v. White, 113 Ill. Rep. 637 (1885); Rotch v. Emerson, 105 Mass. 431, 433 (1870); Dennett v. Dennett, 40 N.H. 498, 500 (1860); Coon v. Coon, 38 Misc. 693, 78 N.Y.Supp. 245 (1902); Post v. Hoover, 33 N.Y.Supp. 593 (Ct. of App. 1865); Atkinson v. Hutchinson, 3 P. Wms. 258, 260 (Eng. 1734):

> "Where words are capable of a twofold construction even in the case of a deed (and much more of a will), it is just and reasonable that such construction should be received as tends to make it good . . . ."

17. Cartinhour v. Houser, 66 So.2d 686 (Fla. 1953).

18. Hooper v. Stokes, 107 Fla. 607, 145 So. 855 (1933) (Testator's express intent will determine the interpretation of a will, though the will is harsh and unnatural); Vanroy v. Hoover, 96 Fla. 194, 117 So. 887 (1928); Newman v. Smith, 77 Fla. 633, 82 So. 236 (1918); Eberlin v. Brunner, 233 Mo. App. 563, 123 S.W.2d 543 (1939); *In re* Bose's Estate, 136 Neb. 156, 285 N.W. 319 (1939).

1. TRIBBLE, FLA. EVIDENCE § 4757, p. 1061.